

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1162

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,

vs.

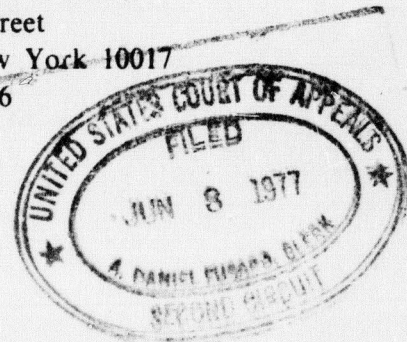
ALFRED CATINO,
Defendant-Appellant,

-and-

PUBLIC SERVICE MUTUAL INSURANCE CO.,
Respondent-Appellant.

SURETY'S REPLY BRIEF

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Standard Form Appeal Bond.	A1
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Docket No. 77-1162

-vs-

ALFRED CATINO,

Defendant-Appellant,

and

PUBLIC SERVICE MUTUAL INSURANCE CO.,

Respondent-Appellant.

SURETY'S REPLY BRIEF

The surety, Public Service Mutual Insurance Company, submits this brief in reply to the answering memorandum of the Government.

It is of interest to note that neither the Government nor Judge Pollack ever disputed one iota the statements of fact contained in the affidavits submitted by the surety - the affidavit of Abraham Newman, the surety, and the affidavit of Eddie Aponte, the deputy clerk of the district court, in charge of appeal bonds. It is significant to note that in no way did either the district court or the Government ever state that Eddie Aponte or Abraham Newman were wrong, and

that appeal bonds were not used. At no time did either the Government or Judge Pollack ever cite a single instance, either reported or not, in which an appeal bond was not used on an appeal. Of course, it is significant to note that neither Judge Pollack nor the United States Attorney could find a single reported decision, either from the Court of Appeals or from the District Court, stating that an appeal bond was not necessary during the pendency of an appeal, and that a bond originally filed in the District Court could serve a double purpose of an appeal.

It is well established that in the absence of an evidentiary hearing, affidavits setting forth statements of fact are to be taken as true on the decision of a motion, or an appeal from a motion. S.E.C. vs. Frank, 388 Fed. 2nd 486, 491-493 (C. A. 2, 1968).

The affidavit of Eddie Aponte sets forth the practice of the court, and its many district judges, and is not solely the practice of either the clerk's office, or just Eddie Aponte. The effort of the Government to minimize Aponte's affidavit just is not so. Aponte does not make policy or set practices for the court; he merely follows what has been set forth by the judges themselves. Nor did Aponte develop the standard form appeal bond which is used exclusively for appeals to the U. S. Court of Appeals from judgments of conviction in the United States District Court. Aponte was merely utilizing the standard

form appeal bond, which had been developed by the judges themselves. A copy of that standard form appeal bond is set forth as an appendix to this reply brief. It is to be noted that the language of this standard form appeal bond differs substantially from the language of the standard form trial bond. It should be noted that in both its answering brief in this court and in its motion papers in the district court, the Government candidly states the bond was not re-written. This concession evidences well that the Government knew very well that the bond had to be re-written, and that it is the practice of the court to require that a bond be re-written when a defendant takes an appeal.

There is no merit to the Government's position that the surety waived any objection to the action of the District Court, by not promptly moving to contest the act of the District Court in allowing the defendant to remain on the existing bond pending appeal. At all times it has been the position of the surety that by its very language, the trial bond expired and was exonerated, when the defendant surrendered on the date of sentencing. As such the surety submits that it had no standing, nor any necessity, to apply to the district court for relief. If there was anything to be done on the date of sentencing, it was for the district court to require a new bond to be posted, and for the United States Attorney to request of the court that the defendant not be admitted to

bail pending appeal, until such time as he files a proper appellate bond. Unfortunately, in this situation we have a double error committed by both the Government and by the District Court, in which both allowed the defendant to walk out of the court room without posting an appellate bond. As such, the Government should be estopped from arguing that forfeiture is required on this particular trial bond. The Government should not receive the windfall of a forfeiture in the sum of \$50,000.00, when it was the United States Attorney himself who allowed the defendant to walk out of the court room, without requesting the District Court to require the posting of a proper appellate bond.

The reality of the situation is that in every instance for years and years and years, it has been the requirement of the District Court, and its many District Judges, that a defendant post a standard form appellate bond, if he wishes to be admitted to bail pending appeal. It has been the constant and steadfast position of every District Judge for years and years and years, that a standard form trial bond expires on the date of sentencing, and does not continue pending appeal. Judge Pollack was obviously well aware of that, for in his opinion on this motion, he could not and did not contradict the statement of facts as set forth in the affidavit of Eddie Aponte.

The language of the trial court bond cannot be read out of context, but must be read within the proper context and circumstances of the practices and policies of the District Court, and its requirement that a standard form appellate bond be used by any defendant who wishes to appeal his conviction. When viewed against the background of the existence of a standard form appeal bond, and its use in thousands of situations on a day to day basis over a period of time by all of the District Judges, it is obvious that the language of the trial bond clearly indicates that it expires on the date of sentencing. In fact, Judge Pollack himself could not even point to a single instance in which on another occasion he allowed a defendant to be admitted to bail pending appeal, without the posting of a new bond.

CONCLUSION

The surety produced the defendant for sentencing and surrender. The District Court took it upon itself to release the defendant pending appeal, without requiring him to post a standard form appeal bond. The United States Attorney stood silently in the court room on that day, and did not remind the District Court that a standard form appeal bond is a necessary prerequisite for admission to bail pending appeal. In view of the errors of both the District Court and the Government, the Government should be estopped from claiming that the

surety owes it the sum of \$50,000.00. The surety complied with the terms of the trial bond, and produced the defendant for surrender. Judge Pollack took it upon himself to release the defendant, even though he had appeared for surrender and sentencing.

A decision of this court contrary to the position of the surety would seriously undermine the entire practice of the various surety companies in posting appearance bonds in the District Court. The surety would have to decide at the time of arrest and/or indictment, whether or not it wished to post an appearance bond not just for the trial, but also for the appeal. Furthermore, financial arrangements would have to be substantially changed as the posting of only one bond would result in the payment of only one fee, whereas the present situation requires the payment of a second commission for an appeal bond. Furthermore, the surety companies would have to evaluate their requirements for collateral, if they believed that the bond covered both the appeal and the trial. In short, an adverse decision would wreck havoc with the entire surety industries' posting of appearance bonds in federal court. This case should not provide the vehicle for a complete revamping of the surety industry with regard to the federal court. This case involves nothing more than the fact that both Judge Pollack and the United States Attorney erred, and neither are prepared to accept the

consequences of their error. Each wants the surety to forfeit the sum of \$50,000, when it is obvious that the surety has done nothing wrong.

Respectfully submitted,

H. ELLIOT WALES
Counsel for Surety

Dated: June , 1977

STANDARD FORM APPEAL BOND
UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF NEW YORK) SS:

A1

BE IT REMEMBERED, that on this _____ day of _____
in the year of our Lord one thousand nine hundred and _____
before me _____ of the District Court of the United
States for the Southern District of New York, in the Second Circuit, personally
came _____ Principal
of No. _____, and
MIDLAND INSURANCE COMPANY Surety, of 1 STATE
STREET PLAZA NEW YORK, N.Y. 10004, and severally acknowledged themselves to
owe to the United States of America, that is to say, the said,
_____, Principal, the sum
of _____ DOLLARS, and the said
MIDLAND INSURANCE COMPANY Surety, the sum of
_____ DOLLARS, separately
to be levied and made of their respective goods and chattels, lands and
tenements, to the use of the said United States, if default shall be made
in the conditions following, to wit:

WHEREAS, lately, in the _____ day of _____
in the District Court of the United States for the Southern District of New
York, in a cause pending in said District Court between the United States of
America and _____, defendant, a
judgment and sentence was rendered against the said _____
_____, and the said _____
_____ filed an appeal in the United States
Court of Appeals for the Second Circuit to reverse the judgment and
sentence imposed against him, and

WHEREAS, bail was fixed in the sum of _____
DOLLARS pending the disposition of said appeal.

NOW, the conditions of this recognizance are such, that if the said _____ shall appear
either in person or by attorney in the United States Court of Appeals for
the Second Circuit when said cause is reached for argument or when required
by law or rule of said United States Court of Appeals and from day to day there-
after in the said United States Court of Appeals until said cause is finally
disposed of, and shall abide by and obey all orders made in said cause and shall
surrender himself in execution of the judgment and sentence appealed from
upon such day as the District Court of the United States for the Southern
District of New York may direct, if the judgment and sentence appealed from
shall be affirmed, and shall appear before the District Court of the United
States for the Southern District of New York on such day or days as shall be
set for a retrial of said case, provided the judgment of the District Court
of the United States for the Southern District of New York is reversed by the
said United States Court of Appeals; and shall not depart the jurisdiction of the
District Court of the United States for the Southern District of New York
without leave, then this recognizance to be void, otherwise to remain in full
force, virtue and effect.

And we, the undersigned Principal and Surety, do hereby STIPULATE,
AGREE AND CONSENT, that in case the aforesaid Recognizance shall be
forfeited judgment may be entered for the sum set forth in said Recognizance
and that execution issue thereon according to law.
Acknowledged before me the day _____
and year first above written.

United States Magistrate
Southern District of New York

Principal
MIDLAND INSURANCE COMPANY

By _____
Attorney in Fact

COURT OF APPEALS
SECOND CIRCUIT

PUBLIC SERVICE MUTUAL INSURANCE CO.,

Appellant-Surety,

-and-

ANTHONY CATONO, THERESA PEDUTO, MARY MARICCIO,

AND FERRY DE FEO, *against -*

Appellants-Indemnitors,

-and-

ALFRED CATINO,

Defendant,

-against-

UNITED STATES OF AMERICA,

APPELLEE.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action,
is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 8th day of June, 19 77 at 1. 1 St. Andrews Plaza; N.Y., n .y.
2. 401 Broadway; N.Y., N.Y.

deponent served the annexed

upon

Reply Brief

1. Robert Fiske Jr. U.S. Attorney

2. Jeff Weisenfeld

the in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this 8th
day of June, 19 77

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

Kevin E. Thomas
Print name beneath signature
KEVIN E. THOMAS